

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLIFFORD DOUGLAS COURTER,

Defendant-Appellant.

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UNPUBLISHED

February 2, 2001

No. 221528

Kent Circuit Court

LC No. 98-009834-FH

Before: Wilder, P.J., and Hood and Cavanagh, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of criminal sexual conduct, second degree, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and was sentenced to 42 months' probation, with the first six months to be served in jail. Defendant appeals as of right. We affirm.

Defendant raises several arguments in support of his contention that he was deprived of his constitutional right to due process. Generally, as a question of law, we review de novo a defendant's alleged deprivation of due process. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999).

Defendant contends that his due process rights were violated by the prosecution's failure to provide him with certain exculpatory evidence. Generally, a criminal defendant does have a due process right to access information possessed by the prosecution. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). In fact, we have ruled as follows:

In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Id.* at 281-282 (citing *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963)).]

In the instant matter, defendant contends that the prosecution withheld an earlier police report filed by the victim's mother. Defendant suggests that this earlier police report must exist

because a police report dated July 15, 1998, indicated that an incident was reported on May 19, 1998. On the other hand, the incident at issue in this case was alleged to have occurred on or about June 12, 1998. Thus, defendant contends that the complainant must have reported some earlier incident on May 19, 1998. However, this argument ignores the fact that the July 15, 1998, report also indicates that the event also **occurred** on May 19, 1998. In fact, in addition to the date, the report indicates that the incident occurred and was reported at the same time—despite the practical impossibility of such an event.

Moreover, the complainant testified that, although she had concerns before the incident occurred, her only action was to pray. In addition, she testified that she reported the June 12, 1998, incident approximately one week after June 27, 1998. During cross-examination, defendant did not even ask the witness if she reported anything to the police on May 19, 1998. Regardless, the detective handling the case testified that he interviewed the complainant on July 9, 1998. The detective testified that, for convenience, he receives blocks of case numbers at one time, and fills in the information later as cases are reported to him. In other words, the detective's testimony suggested that the May 19, 1998, date reflected the date that the case numbers were assigned to him, and not the date that the specific case was assigned to him. In sum, the witness testified that the dates were erroneous.

Nevertheless, defendant contends that the prosecution's failure to disclose the May 19, 1998, report was prosecutorial misconduct. However, defendant has not established that such evidence even exists. In the absence of any proof that additional evidence exists, we are unable to conclude that the prosecution suppressed the evidence, much less that the suppression of this hypothetical evidence impacted the outcome of the proceedings. This is especially true in light of defendant's admission that he touched the victim's vaginal area on June 12, 1998. Accordingly, we conclude that defendant has failed to establish a due process deprivation based on the prosecution's failure to disclose exculpatory evidence. See *Lester, supra* at 281.

Defendant also contends that he was denied due process by the detective's dishonesty. Defendant contends that the detective initially stated to his first attorney that he did not know why the report stated May 19, 1998, and indicated that he would look into the matter. Defendant testified that the detective called his attorney back to explain that the case numbers were assigned five at a time. The attorney testified in a manner that confirmed the detective's testimony, rather than defendant's. Regardless, the trial court instructed the jury to consider the detective's credibility in the same manner that it considered the credibility of all witnesses. Presumably, it did not find the detective's testimony problematic. Thus, we are not persuaded that the detective's testimony or earlier statements deprived defendant of due process as a matter of law.

Finally, defendant contends that the trial court's sua sponte instruction that defendant's testimony regarding what the detective initially told the first attorney, as described to defendant, was relevant solely for the impeachment of the detective's credibility. On appeal, defendant contends that this instruction advised the "jury not to consider the central theme of defendant's case . . . ." Indeed, in *People v Jones*, 419 Mich 577, 580-581; 358 NW2d 837 (1984), our Supreme Court ruled that an error requiring reversal occurs where a trial court sua sponte instructs on the prosecution's theory of the case without providing a similar instruction for the

defendant's theory of the case. Thus, defendant contends that the trial court's instruction was an error requiring reversal under the *Jones* decision.

We note, however, that defendant did not object to the trial court's instruction, or raise these arguments below. Because defendant failed to object to the instruction, the issue is forfeited unless defendant demonstrates a plain error affecting his substantial rights that was also outcome determinative. See *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Defendant conceded that he touched the victim's vaginal area on or about June 12, 1998. The only question was whether he did so with a sexual purpose. The date of the police report and Parolini's testimony regarding the police report were not relevant to defendant's sexual purpose or lack thereof when he touched the victim. MRE 401. Nevertheless, defendant's testimony was relevant to Parolini's credibility. Thus, the trial court did not err by instructing the jury that it was relevant on that basis. Moreover, the attenuation between defendant's testimony and defendant's alleged sexual purpose prevents us from concluding that the instruction was outcome determinative. Accordingly, defendant has forfeited this issue for appellate review. *Carines*, *supra*. Further, defendant's reliance on *Jones* is misplaced; the trial court's instruction regarding the scope of admissibility of evidence is not tantamount to a disparagement of defendant's theory of the case.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ Harold Hood  
/s/ Mark J. Cavanagh